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IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

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1 Civil No. 13,926

MENLO SOCIAL CLUB, INC., A CORPORATION,
Plaintiff and Appellant,

vs.

EDMUND GERALD BROWN AS DISTRICT ATTORNEY, MICHAEL MITCHELL AS CHIEF OF POLICE AND J. WARNOCK WALSH AS PRESIDENT OF THE POLICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA,

Defendants and Appellees

JURISDICTIONAL STATEMENT

This Jurisdictional Statement is made pursuant to Rule 12 of the Rules of the Supreme Court of the United States and accompanies the petition for allowance of an appeal to the said Supreme Court.

In the trial court appellant sought an injunction to prevent arrest of its members and raids on a social club it kept and maintained as a place where draw poker and draw low ball poker were carried on and conducted. The arrests and raids were made because of alleged violation of section 288 of the Police Code of San Francisco, enacted in 1903. The trial court made an order denying the injunction.

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The validity of the statute on the ground of its being repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States was first drawn in question by the complaint for injunction. The same question was repeatedly urged and presented at all stages on appeal from the order of the trial court denying the injunction.

A statement of the grounds upon which it is contended that substantial constitutional questions are involved is as follows:

1. The playing of draw poker or draw low ball poker in a social club or private home is a fundamental right of free men, and the use of premises for such purposes is a fundamental property right. Deprivation of these rights is here involved because section 288 of the Police Code of San Francisco has been held prohibitory thereof. A substantial constitutional question is therefore involved. (*Cantwell* v. *State*, 310 U. S. 296.)

2. Section 288 of the Police Code of San Francisco is ambiguous and uncertain law. It is sought to deprive appellant of its property and appellant's members of their liberty for violation of that law. A substantial constitutional question is therefore presented. (*Lanzetta* v. *New Jersey*, 306 U. S. 451.)

3. Section 288 of the Police Code of San Francisco is an archaic law. It was enacted in 1903. Changed conditions will not longer permit it to be said that free men may not play draw poker or draw low ball poker in a social club or private home, or that property owners may not use their property for such purpose. Appellant is threatened with deprivation of its property and appellant's members are threatened with deprivation of their liberty under a law which, if valid when enacted in 1903, has nevertheless been invalidated by changed conditions. A substantial constitu-

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tional question is therefore involved. (*Nashville, C. & St. L. Ry. Co.* v. *Walters*, 294 U. S. 405.)

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two, is officially reported in the advance sheets as 90 A.C.A. 1042. It is not officially reported in permanent form. A copy of the opinion is annexed hereto as Exhibit A.* The trial judge wrote an opinion on denial of the injunction. It is not officially reported in any permanent form. A copy of the opinion is annexed hereto as Exhibit B.*

1. The Jurisdiction of the Supreme Court of the United States

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is 28 U.S.C., Judiciary and Judicial Procedure, sec. 1257 (2).

From the opinion of the state court of last resort it clearly appears that a state statute, to-wit, section 288 of the Police Code of San Francisco was held constitutional as against the claim of appellant that it was unconstitutional. It is true that the opinion does not expressly refer to any provision of the Federal Constitution. But the situation here parallels that reviewed by the court in *New York* v. *Zimmerman*, 278 U. S. 53. Here, as there, the state appellate procedure required no assignment of errors, but merely required that the points on appeal appear in the briefs. (Rule 15 (a), Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California.) At pages 19 and 23 of its opening brief on appeal appellant specifically challenged section 288 of the Police Code of San

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* (Clerk's Note.—These opinions are printed as appendices to the Statement as to Jurisdiction in the case of *Remmer* v. *Municipal Court*, No. 277 O. T. 1949 and are not duplicated here.)

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Francisco as repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States. That challenge was urged and repeated in all subsequent stages of the appeal. Jurisdiction of this Court is therefore supported by the case just cited. It is also apparent that the decision of the Federal question was necessary to the appeal, and that the opinion of the District Court of Appeal could not have been given without deciding that said section 288 was not repugnant to the said Fourteenth Amendment. Jurisdiction is therefore supported by *Lynch* v. *People of New York*, 293 U. S. 52.

2. The Statute, the Validity of Which Is Involved

The statute is section 288 of the Police Code of the City and County of San Francisco, State of California, enacted in 1903. It provides:

> "It shall be unlawful for any person to keep or maintain, or visit, or to contribute to the support of any house or place where gambling is carried on or conducted, or to knowingly let or underlet, or transfer the possession of, any house or premises for use by any person for said purpose."

3. The Date of the Judgment Sought to Be Reviewed

The judgment of the District Court of Appeal of the State of California, First Appellate District, Division Two, was filed March 29, 1949. It became final as to that court 30 days after such filing. (Cal. Rules on Appeal, Rule 24(a), 22 Cal. 2d 17.) But the Supreme Court of the State of California had jurisdiction to grant a hearing in the cause providing a petition for hearing by the said Supreme Court was filed within 40 days after the filing of the decision of the District Court of Appeal. (Cal. Rules on Appeal, Rule 28 (b), 22 Cal. 2d 20.) Within the said 40 days

plaintiff and appellant duly filed such petition for a hearing by the said Supreme Court after decision by the District Court of Appeal, and the petition was denied by the said Supreme Court on May 26, 1949. The judgment of the said District Court of Appeal is therefore a final judgment in the highest court of the State of California in which a decision in the cause could be had. Application for appeal to the Supreme Court of the United States was presented June 24, 1949.

Dated: San Francisco, June 24, 1949.

SIMEON E. SHEFFEY,
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Mills Building.

No. 277. REMMER *v.* MUNICIPAL COURT OF THE CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.; and

No. 278. MENLO SOCIAL CLUB, INC. *v.* BROWN, DISTRICT ATTORNEY, ET AL. Appeals from the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Simeon E. Sheffey* for appellants. *Fred N. Howser*, Attorney General of California, and *Clarence A. Linn*, Deputy Attorney General, for appellees. Reported below: 90 Cal. App. 2d 854, 204 P. 2d 92.